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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BEATRICE AGUIRRE, Personal Representative of the Estate of Alfredo Aguirre, deceased and PATRICK ANTONE, *Petitioners,*

v.

UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF DEFENSE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

In a federal tort claims action, the District Court granted summary judgment solely on the question of law that the government did not owe a duty to the plaintiffs. Initially, the federal court of appeals affirmed the trial court decision regarding the absence of a duty on the basis of Arizona law. When the appellants petitioned for rehearing on the basis of a new opinion of the Arizona Supreme Court, the Court of Appeals completely changed its decision to find that the government had owed a duty of care to the plaintiff and plaintiff's decedent. However, having found that there was a duty, the Court of Appeals, in its amended decision, discussed the facts for the first time. Neither the government in its motion, nor the District Court in its minute order had taken the position that there were insufficient facts to warrant a trial. The Court of Appeals reviewed the evidence in a light which was unfavorable to

the plaintiffs and made the determination that the government had not breached its duty. Thus, the questions presented for review are:

1. Does a federal court of appeals exceed its authority and violate the appropriate standard of review when reviewing an order of summary judgment by deciding *de novo* a question of fact, that was never touched upon by the trial court, on the basis of inferences from the record which are clearly contrary to the interests of the non-movant party.

2. Did the court of appeal's departure from the accepted course of judicial proceedings wrongfully deprive the petitioners of their right to a trial on the evidence?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 8, 1992.

OPINIONS BELOW

The original memorandum decision of the Court of Appeals for the Ninth Circuit is

reprinted in the Appendix hereto p. A-1, infra;

The amended memorandum decision of the court of Appeals for the Ninth Circuit is reprinted in the Appendix hereto p. A-32, infra;

The order of the trial court granting summary judgment is reprinted in the Appendix at p. A-70, infra.

JURISDICTION

The instant proceeding is a federal tort claims action brought pursuant to 28 U.S.C. § 2671, et. seq. The District Court entered summary judgment for the government and petitioners filed a timely notice of appeal. After briefs and oral argument, the Ninth Circuit Court of Appeals issued a memorandum decision affirming the District Court's order on March 3, 1992. Petitioners filed a timely petition for rehearing and the Ninth Circuit Court of Appeals denied the petition for rehearing but issued an

amended decision on July 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Dela-Tek, Inc. operated a munitions plant on land leased to it by the Gila River Indian Community near Coolidge, Arizona. The United States entered into a contract with Dela-Tek, Inc. to manufacture certain munitions and government contracts were the only work being performed by Dela-Tek, Inc. at this plant.

The contract between Dela-Tek, Inc. and the United States specified that the contractor would have to adhere to certain safety regulations and be subject to government safety inspections. The government contract contained a section entitled "Safety Precautions for Ammunitions and Explosives" which required that the contractor "shall comply with the DOD [Department of Defense] Contractor's Safety

Manual for Ammunition, Explosives and Related Dangerous Materials (DOD Manual 4145.26M)".

The Safety Precautions for Ammunition and Explosives authorized the government to inspect Dela-Tek's plant for compliance with the Contractor's Manual safety guidelines. The DOD Safety Manual authorizes government safety inspectors to provide technical advice and assistance to contractors on safety issues, including helping a contractor implement any corrective actions deemed necessary as a result of the quarterly inspection.

Under the terms of the DOD Safety Manual, when an inspector found a condition that violated the safety provision of the contracts, the inspector was to decide whether increased surveillance by the government was necessary and whether the contractor must attempt to correct the problem. In the case of a particularly

serious safety problem, the government inspector was authorized to set a specific time frame within which the contractor must correct the problem. Once a corrective measure was mandated, the inspector was required to follow up and ensure that the contractor implemented the change in procedure or operation on a timely basis. The government was authorized to suspend or cancel its contract if the contractor, in this case, Dela-Tek, was repeatedly or constantly out of compliance with safety guidelines.

Cecille King was the Government-employed Safety Specialist who conducted the Quarterly Safety Survey on March 14, 1986. During that Quarterly Safety Survey, Ms. King noted that Dela-Tek's safety program was not in compliance with the contractual safety requirements. She testified in deposition that as of that date virtually all of Dela-Tek's operating procedures had

problems and as a result under the contract "Method 3" corrective action was required.

Method 3 was the highest degree of corrective action. It required that the deficiencies **must** be corrected within a certain time frame. Ms. King testified in deposition that Method 3 corrective action was required when the deficiencies were considered serious. (King deposition, p. 35).

With regard to follow-up actions, Paragraph 4-504 of the Specialized Safety Manual provides:

> A. Due to the infrequency of onsite presence of Safety Specialists in contractor facilities, followup to recommended corrective actions is of paramount importance. No interim means are available to Safety Specialists to assure that deficiencies do not result in mishaps before they are corrected. Therefore, Safety Specialists must assure that contractor corrective actions are both timely and effective.
>
> B. A followup system based upon suspense date criteria will

be established to monitor contractor responses to recommended corrective actions and ACO/PCO correspondence. Each contractor response will be thoroughly analyzed to assure that corrective actions are adequate and when applicable address the abuses of deficiencies, not just the noted occurrences.

C. Within 30 days after receipt of the contractor's response to a request for corrective action, a followup visit will be performed if doubt exists that corrective actions are satisfactory or if recurrence of conditions that caused deficiencies is considered likely.

D. In cases where deficiencies are serious and a high potential for mishap exists, followup visits must not be delayed until receipt of contractor formal responses. Corrective action time frames must be established with the contractor during the exit interview and a followup visit conducted at the end of that time period. (Emphasis supplied.)

(Appellants' Excerpt of Record, item 24, paragraphs 23, 24 and 25.)

Ms. King observed numerous problems that required Method 3 corrective action among which were the following:

a. Protective coveralls were not mandatory wear by operators (a violation of Contractor's Manual, Chapter 3, Paragraph L) (CM. Ch., Para.).

b. Training in operating procedures was not accomplished (violation of CM, Ch. 11, Para. M12).

c. There was no washdown for buildings with pyrotechnic processing equipment (violation of CM, Ch. 8, Para. M).

d. Explosive clothing was not fire retardant (violation of CM, Ch. 3, Para. 11).

e. Operators involved in hazardous operations such as blending and cleaning of pyrotechnic process equipment do not wear additional protective clothing (violation of CM, Ch. 8, Paras. C and O).

f. Operator training did not include operating procedures or hazardous materials information (violation of CM, Ch. 3, Para. C6 and Ch. 11, Para. M12).

g. Operating procedures did not include specific emergency procedures, protective clothing/equipment, details of tasks, or specific safety precautions (violation of CM, Ch. 3, para C1).

h. Hazardous dust accumulated on the floor, ledges, and the granulator in the granulator building (violation of CM, Ch. 3, Para. E).

i. There was no tool control in the granulator building (violation of CM, ch 3, Para. H5).

Because it was determined by Ms. King that the contractor's safety violations required Method 3 corrective action, the administrative contracting officer [ACO] was required by the procedures of the Specialized Safety Manual to send a letter to the contractor after the March 14, 1986 survey, but she did not do so. (King deposition, pp. 59-60, Appellants' Excerpt of Record, item 24, paragraph 33.)

Ms. King determined during her March 1986 Quarterly Safety Survey that Dela-Tek was not in compliance with the Government contract requirements. She testified that the safety regulations in the contract requires the Government to cease administering the contract in any way when they have notice that a contractor is not in compliance and in constant violation of the contract. (King deposition, p. 93;

Appellants' Excerpt of Record, item 24, paragraphs 31-32.

Ms. King also testified that as the result of her March 14, 1986, Safety Survey she recommended that a new contract not be awarded to Dela-Tek because of their unsafe operating procedures (Appellants' Excerpt of Record, item 24, paragraph 34).

On March 26, 1986, less than two weeks after the Quarterly Safety Survey an explosion occurred which seriously injured Dela-Tek employee James McAffee. Mr. McAffee was granulating magnesium teflon powder. In violation of the government contract, as Ms. King's recent safety survey had determined, there were no standard operating procedures for the granulating process. The machine jammed. Although the government safety manual required that no tool which could create a spark would be used around an explosive material such as magnesium, Mr. McAffee had been taught by

his supervisor to use a knife to unjam the machine. An explosion resulted which injured James McAffee. (Appellants' Excerpt of Record, item 24, paragraphs 15, 35-38).

Because of the explosion which caused Mr. McAffee's injuries, Ms. King made a follow-up safety survey in April 1986 pursuant to paragraph 4-504(A) of the Specialized Safety Manual. On her second visit, she noted that the safety violations which she had observed in March had not been corrected. During her follow-up safety survey in April, Ms. King again determined that Dela-Tek was not in compliance with safety requirements and that the highest form of corrective action - Method 3 - was required. (Appellants' Excerpt of Record, item 24, paragraphs 39-40).

On May 19, 1986, another explosion occurred at Dela-Tek which resulted in the death of plaintiffs' decedent, Alfredo Aguirre, and serious, permanent injuries to

plaintiff, Patrick Antone. It was determined that the explosion was caused by circumstances very similar to the previous March 1986 McAffee incident. (Appellants' Excerpt of Record, item 24, paragraph 41).

The plaintiffs brought this federal tort claims action for the wrongful death of Alfredo Aguirre and the serious, permanent injuries to Patrick Antone. Under 28 U.S.C. § 1346(b), the government is liable to the claimant in accordance with the law of the place where the act or omission occurred". The United States moved for summary judgment on the legal argument that it was not responsible to the employees of an independent contractor because it did not retain "day to day" control over the safety of the work place. The plaintiffs citing Arizona law which relies heavily on the principles of the Restatement responded with the argument that there was sufficient evidence to establish a duty of care on the

defendant according to the Restatement of Torts Second, § 414. The district judge granted summary judgment apparently on the question of duty but without any specific explanation, merely citing two authorities from other jurisdictions (Texas and Pennsylvania) that either had not adopted § 414 of the Restatement or construed it in a manner which was substantially different from Arizona.[1] It is clear from the trial court's order (Appendix A-70) that it considered the issue of duty to be a pure question of law. There were no findings of fact by the Court.

The Ninth Circuit Court of Appeals, interpreting what it believed to be the

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[1]James McAffee who had been injured in the first explosion had also brought a federal tort claims action. McAffee v. United States of America, CIV 87-2231 PHX EHC. Judge Earl H. Carroll of the District of Arizona denied the identical motion for summary judgment on the basis of Arizona law and § 414 Restatement Second of Torts.

controlling Arizona law, affirmed the trial judge's order of summary judgment holding that unless there was "day to day" control over the contractor's operation the government had no liability to the contractor's employees (Memorandum decision, p. 11, Appendix A-18-19). Then citing the same decisions from federal courts in Texas and Pennsylvania as the trial judge's order, the circuit court of appeals held "that the government's exercise of its right to inspect does not open the door to section 414 liability". (Id.)

While the appeal was pending, the Arizona Supreme Court rendered a decision in Lewis v. N.J. Riebe Enterprises, Inc., 825 P.2d 5 (1992) which made it clear that the Court of Appeals had misconstrued the applicable law and that Arizona did not require day to day control and that the government's contractual safety requirements, its quarterly inspections and

its right to demand compliance by the contractor was a sufficient retention of control to establish a duty toward the plaintiffs under § 414 Restatement (Second) Torts. 825 P.2d at p. 12. Because the decision in Lewis v. N.J. Riebe Enterprises, Inc., supra, made it clear that the government did have a duty toward the petitioners under Arizona law, a timely petition for rehearing was filed.

On July 8, 1992, in a 2-1 decision, the panel voted to deny the petition for rehearing, but drastically amended its previous decision to reflect a complete reversal in its previous resolution of the appeal.

Instead of holding that the government had no duty, the decision was amended to state that "[c]learly the government had a duty of care to the employees of Dela-Tek" (Amended Memorandum Decision p. 11, Appendix A-47-48). Having totally changed its

opinion on the legal question of duty, the Court of Appeals then went on to affirm the summary judgment on the basis of a *de novo* finding of a disputed material fact which was unfavorable to the Appellants. Inexplicably, the majority expressed agreement with the District Court's "factual conclusion" that the government had not breached its duty toward the Appellants (Amended Memorandum Decision p. 11, Appendix A-48). However, despite the Court of Appeals statement, the record is clear that the trial court had never made any factual findings (Minute order Appendix A-70). The dissenting judge expressed his "strong" disagreement with the majority's decision.

In summary, the amended decision completely reversed its previous position regarding the government's duty but maintained the same result by making its own factual determination and in the process violating the standard of review by not

viewing the evidence in the light that was most favorable to the Appellants.

REASONS FOR GRANTING THE WRIT

I.

The Safety Responsibility Of the Government Toward The Employees of Its Subcontractors Is A Matter of Far Reaching Importance.

Alfred Aguirre and Patrick Antone worked for low wages in the highly dangerous job of making munitions for the United States Government. The fact that they worked for a private contractor who had set up its business on an Indian reservation deprived them of the general regulatory safety protections more often found and enforced in cosmopolitan work environs. It was evident from the testimony of the government inspector, Ms. King, that the contractor Dela-Tek was in constant violation of the safety requirements in its contract with the government.

The pattern of violation and serious injury or death is readily discernable and alarming. The government inspector found numerous safety violations during her quarterly inspection and twelve days later a workman was seriously injured in an explosion. A follow up inspection in April demonstrated that the identifiable hazards had not been corrected. Within a month, there was a second explosion which killed Alfredo Aguirre and seriously injured Patrick Antone.

A clear, unequivocal decision by this Court is the only way to stop the cycle of violation and injury or death. A clear, unmistakable decision by this Court is the only way to see to it that the necessary safety regulations are enforced. A decision in this case will send a clear message to the safety inspectors and through them to the contractors that the safety regulations must be complied with or the contract will

be withdrawn. Judge Reinhardt in his dissent expressed his strongly held opinion that the majority's decision was contrary to the mandate of the Federal Tort Claims Act. (Memorandum decision, dissent p. 5, Appendix A-63.)

It is a tragedy that the poor and uneducated risk their lives and limbs to produce government ordnance and yet cannot enjoy the protection of the government's safety regulations. Unless this Court clearly identifies the duty, the violations will go uncorrected and there will be many more victims.

II.

The Decision Of The Court Of Appeals Should Not Be Allowed To Stand Because It Is In Direct Contravention Of The Applicable Standard Of Review.

When reviewing a District Court's grant of summary judgment, the Court of Appeals "must determine, viewing the evidence in the

light most favorable to appellants whether issues of material fact exist and whether the District Court correctly applied the relevant substantive law. Image Technical Service Inc. v. Eastman Kodak Co., 903 F.2d 612, 614 (9th Cir. 1990), cert. granted 111 S.Ct. 2823.

The Court of Appeals violated that standard of review and affirmed the District Court's order of summary judgment in two diametrically opposite memorandum decisions. In the original memorandum decision, the Court of Appeals treated the argument exclusively as a question of law and affirmed the trial court's finding that the government did not owe the dead and injured workmen a duty of care. At that stage, both the District Court and the Court of Appeals had applied the wrong substantive laws. Although Appellants' petition for rehearing was denied, the Court did a complete turnaround on the question of duty.

(Compare the difference in the legal analysis in the respective decisions in the Appendix.)

When the Court of Appeals changed its focus from the applicable substantive law to the material facts in the record, it violated the applicable standard of review by not considering this evidence in the light most favorable to the plaintiffs. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to drawn in his favor". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202, 216 (1986).

Applying that standard to the case at bar, the Court of Appeals would have had to have drawn all favorable inferences from the evidence including the actual notice of safety violations uncovered in the March and April inspections; the first explosion in March; and the total failure of Dela-Tek, Inc. to correct the violations after the

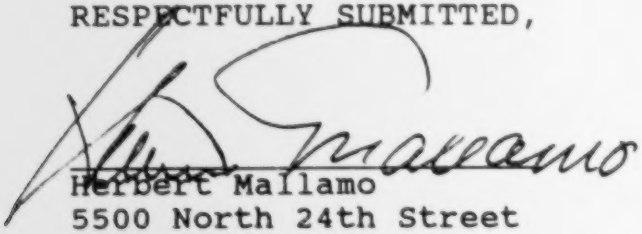
first explosion. Under these circumstances the contract required that the government cease administering the contract. If the government had fulfilled its responsibility to the workmen, the second explosion would have been prevented.

It is especially ironic and incongruous that summary judgment was denied by Judge Carroll in McAffee v. United States, the first explosion, but granted in the instant case, despite the additional notice of the repeated violations and unsafe conditions. Judge Carroll's denial of the identical motion is compelling proof that reasonable minds could find a violation of the government's safety responsibility. The Court of Appeals committed a serious error of law in affirming the order of the same judge.

CONCLUSION

The Writ of Certiorari should issue in this case for the reasons stated.

RESPECTFULLY SUBMITTED,



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